

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF UTAH

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5 UTE INDIAN TRIBE OF THE )  
6 UINTAH AND OURAY INDIAN )  
7 RESERVATION, a federally )  
8 recognized Indian Tribe, )

9 Plaintiff(s), )

Case No. 2:23-cv-00295

10 v. )

11 DAVID URE, MICHELLE )  
12 MCCONKIE, MICHAEL STYLER, )  
13 SPENCER COX, UTAH SCHOOL AND )  
14 INSTITUTIONAL TRUST LANDS )  
15 ADMINISTRATION, )

16 Defendants. )  
17 \_\_\_\_\_ )

18 BEFORE THE HONORABLE DAVID B. BARLOW

19 ---

20 Monday, November 18, 2024

21 1:34 p.m. to 1:53 p.m.

22 Motion for Clarification

23 Status Conference

24 ---

25 Reported by: Michelle Mallonee, RPR, CCR (801) 209-4979  
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1 Monday, November 18, 2024; Salt Lake City, Utah

2 1:34 p.m.

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4 THE COURT: Good afternoon. We're convened in  
5 Case No. 2:23-cv-295, the Ute Indian Tribe of Uintah and  
6 Ouray Reservation v. Ure, et al.

7 Would counsel for the plaintiff please state their  
8 appearance.

9 MR. STIEFF: Good afternoon, Your Honor. Preston  
10 Stieff along with Linda Cooper for the plaintiff.  
11 Ms. Cooper will be conducting the argument on our behalf.

12 THE COURT: Very well. Thank you, Counsel.  
13 Counsel for the defendants.

14 MS. WALSH: Vanessa Walsh and Robert Wing for  
15 SITLA and Michelle McConkie.

16 THE COURT: Thank you.

17 MR. KAISER: Kyle Kaiser for Governor Cox and the  
18 former Director Styler.

19 MR. HOPKINS: And Andrew Hopkins for David Ure.

20 THE COURT: Thank you, Counsel. And thank you for  
21 the correction of the pronunciation of his name as well.

22 All right. So we're here on a motion for  
23 clarification and for a status conference. And the posture  
24 means that, really, what we'll be doing here is not you  
25 making arguments to me about what I did, but me explaining

1 to you, since you've raised some questions about what it was  
2 that the Court did or did not do in its ruling. But I still  
3 want to hear from you. So I'm going to give my thoughts in  
4 response, answering the questions that you raised, talk a  
5 little bit about the posture of the case and maybe how that  
6 led us to be where we are right now. Then I'll suggest a  
7 way forward and hear any of your thoughts regarding it.

8 So of course, I, in doing this, reviewed the  
9 Order, the Complaint, and the briefing on the motions that  
10 we're here to discuss.

11 I'll state initially, just because I think it will  
12 be helpful to you going forward in this case as we work on  
13 this together, that the seeds of the uncertainty that ended  
14 up coming to fruition in the ruling, to me, sort of begin  
15 with the Complaint itself. And here's what I mean by  
16 that -- not the entirety of the Complaint, but just parts of  
17 it.

18 The Complaint itself is really heavily focused on  
19 an alleged conspiracy to deprive the individuals of the  
20 Tribe of their constitutional rights. It begins very early  
21 in the complaint and permeates it. I think I brought a copy  
22 of the Complaint here with me. I'll give you some examples  
23 of what I'm talking about here.

24 So for example, looking at paragraphs, starting  
25 with 82, "As part of their conspiracy and also to hide their

1 unlawful conspiracy from the Tribe and the public,  
2 Defendants created a false public record."

3 "Behind the scenes, Defendants conspired that the  
4 public record would begin with SITLA publicly giving DNR an  
5 opportunity to increase its bid...."

6 Defendants knew that the bid was a sham.

7 85. "Consistent with that conspiracy...SITLA  
8 publicly gave DNR twenty-four hours to counter the Tribe's  
9 bid."

10 86. "Consistent with that conspiracy, DNR  
11 submitted a new...bid."

12 88. "Defendants knew the bid...was a sham."

13 89. Defendants conspired that after certain  
14 actions were taken, other actions would be taken, and so on  
15 and so forth.

16 So that seems to be the thrust of the Complaint  
17 here.

18 If I were summarizing my understanding of the  
19 Complaint in a single sentence, I think it would have to be  
20 something like: This case involves a wide-ranging  
21 conspiracy of state employees to deprive the plaintiff of  
22 the right to purchase Tabby Mountain, or something like  
23 that.

24 So then we get to the causes of action. And you  
25 get to Count No. 1, and it references either conspiracy,

1 acting in concert, or defendants' actions collectively  
2 instead of individually at least ten times, by the Court's  
3 count. But Count 1 also, especially -- this is made clear  
4 in retrospect -- is ambiguous because of how it was pled.  
5 Count 1 references two constitutional provisions, equal  
6 protection and due process; five federal statutory  
7 provisions, Sections 1981, 1982, 1983, 1985, 2000d, so it  
8 might be read to be stating one claim or two claims or three  
9 claims. The reader can't tell with confidence, because we  
10 have so many different constitutional and statutory  
11 provisions that are referenced. And again, the thrust of  
12 the Complaint seems to be grounded in conspiracy.

13           So we have at the outset kind of a pleading  
14 clarity problem that I think has got us in this posture  
15 right now; meaning, as a general matter, as all the  
16 experienced and talented lawyers before me know, the  
17 practice is one count, one claim. So that's why we have  
18 multiple counts in the Complaint, is so that you parse them  
19 out into however many different claims that you have, and  
20 each one contains one and not more than one, so you don't  
21 end up with a situation where there's a question about  
22 whether you're pleading one thing or two things or three  
23 things.

24           There is another ambiguity in the Complaint, and  
25 that is the lack of any discussion of whether certain actors

1 are being sued in their official or individual capacities.  
2 We just don't really have information about that in the  
3 Complaint regarding Governor Cox, Director Ure, and then  
4 McConkie, and Styler. Then, of course, as you know already,  
5 the Court dealt with that as best it could, based on the  
6 information that it had in the order.

7 So that's the posture in which the Court  
8 encounters the Complaint. And in some ways, that's why you  
9 sometimes have multiple, you have more than one complaint --  
10 or an amended complaint, is what I mean to say, because the  
11 case is in its early stages.

12 Now, we're here specifically because the  
13 defendants had asked the Court to clarify four things. And  
14 of course, I have the plaintiff's position on where the  
15 Court should be on those things.

16 Question No. 1 -- well, in some ways these were  
17 postured not so much as questions, but here's how I'd like  
18 the Court to view what it did, or here's what I hope the  
19 Court did in its opinion.

20 So defendants, first they clarify that Count No. 1  
21 has been dismissed in its entirety, not just the conspiracy  
22 claim. So Count No. 1, the Court did dismiss it in its  
23 entirety without prejudice, but that was because the Court  
24 viewed it as a conspiracy claim, a conspiracy to deprive the  
25 Tribe of its due process and equal protection rights, not as



1 three different claims -- a conspiracy-to-deprive claim, a  
2 due-process claim, and an equal-protection claim -- because  
3 the Court's expectation is that each claim will be stated  
4 separately by plaintiff in a cause of action.

5 So if plaintiff meant to state or intends to state  
6 multiple different causes of action, the process would be to  
7 file an amended complaint making that clear, so we just have  
8 one in each; each count would state what claim is being  
9 alleged against which particular defendants and in what  
10 capacity, meaning official or individual.

11 The second issue was to clarify that Count 2 has  
12 been dismissed. This is the plea for declaratory and  
13 injunctive relief. And I'm not really sure why defendants  
14 were asking about that. I don't recall the motions to  
15 dismiss discussing Count 2's request for declaratory and  
16 injunctive relief in any detail. It may be that I missed  
17 it, but I don't recall this being a feature of the motions.  
18 In any event, the opinion certainly doesn't address it or  
19 dismiss it. So Count 2 has not been addressed or dismissed  
20 by the Court.

21 Now, to make it clear enough, these are requests  
22 for particular kinds of relief, they're not stand-alone  
23 claims. So there isn't some specific individual liability  
24 in Count 2, but instead, something that would be addressed  
25 at a later date.

1           The third issue was to clarify that Governor Cox,  
2     Director Styler, and Director McConkie have been dismissed  
3     as defendants, both in their official and individual  
4     capacities.

5           Now, I start by noting that the Court, of course,  
6     does not dismiss defendants but dismisses claims. Having  
7     said that, I don't see a current non-dismissed claim where  
8     Governor Cox is a defendant. So I think post the Court's  
9     order, I don't see where he would still be present with a  
10    claim against him.

11          Current Director McConkie and Former Director  
12    Styler, I believe, are still in on Count 3, breach of trust,  
13    which the Court did not address.

14          All right. And then the fourth question was to  
15    clarify that no claims remain against SITLA. So on that  
16    one, again, I'm not sure why the defendants are asking about  
17    that. Page 22 of the order states that SITLA "is entitled  
18    to claim Eleventh Amendment immunity from suit in federal  
19    court," so I think that's contained very explicitly already  
20    in the ruling. If it's immune under the Eleventh Amendment,  
21    then it's not capable of being sued in federal court. So  
22    those are my thoughts in response to the defendants'  
23    questions.

24          I have already indicated but want to make plain,  
25    Counsel for the plaintiff, that we're at an early stage in

1 the litigation. These clarifications can be made by the  
2 plaintiff, if they wish to make them. And the nature of  
3 your interactions suggested to the Court that that would  
4 very likely be the result.

5 So I've done my best here to explain to you what  
6 my thinking was regarding it. And I want to give you both a  
7 chance to say anything that you'd like to about that  
8 clarification, and then we can see whether there's anything  
9 else to take up.

10 So we're here on the defendants' motion. I'm  
11 going to go ahead and let you speak first, and then I'll  
12 turn to plaintiff's counsel.

13 MS. WALSH: Is standing at the podium better?

14 THE COURT: Yeah, it's probably easier here just  
15 because the microphones will be closer to where you'll be  
16 speaking.

17 MS. WALSH: I just had a couple of questions, Your  
18 Honor, as were you going through that. We still have a  
19 little bit of a question.

20 One of the counts, I think it was Count 3,  
21 dismissed Ms. McConkie in her individual capacity. And I  
22 want to, I guess, make sure that I'm clear: She's remaining  
23 in Count 3 in her official capacity?

24 THE COURT: Well, I'm not going to add to the  
25 ruling in any way. So if I didn't address official

1 capacity, then I haven't said anything about it. And the  
2 question would be whether she was brought in the suit in her  
3 official capacity or not.

4 Again, back to our original issue, I don't  
5 remember the Complaint ever saying whether people were being  
6 brought in their official capacity or individual capacity.  
7 And I suspect we're going to see a new complaint anyway. At  
8 least plaintiff's counsel appears -- I'm not going to speak  
9 for her. She will speak for herself momentarily.

10 Go ahead, Counsel.

11 MS. WALSH: The Court also -- they made a Rule 8  
12 argument for Ms. McConkie in her individual capacity because  
13 there are no allegations pled to her. And the Court didn't,  
14 outside of the conspiracy, did not address the Rule 8.

15 Can we take either no allegations against her in  
16 her individual capacity for all of the claims, or just  
17 specific to that one and she remains in in her individual  
18 capacity for the other claims?

19 THE COURT: So Counsel, if I failed to do that,  
20 like if I inadvertently didn't address that specific issue,  
21 I won't expand it now from the bench. And so if I failed to  
22 cover it, whether we have a new amended complaint or not,  
23 the defense side will have leave either to address an  
24 amended complaint, if that's what we get, or if we do not  
25 and you feel like there is an additional motion that needs

1 to be filed to address something that the Court may have  
2 missed, you'll have leave to do so.

3 MS. WALSH: Okay. And then my final comment.

4 The Court indicated that in our motion to dismiss,  
5 we did not discuss Claim 2 for specific relief. And I would  
6 point the Court to Section 1.3 of our motion to dismiss and  
7 then Section 2 of our reply brief, in which we addressed  
8 both of those.

9 THE COURT: Okay. Thank you, Counsel.

10 Counsel for the plaintiff?

11 MS. COOPER: Thank you, Your Honor. We certainly  
12 appreciate what you point out about the Complaint, and so I  
13 thank you and say that an amended complaint will be  
14 forthcoming.

15 THE COURT: Okay. Very well.

16 And Counsel, how long would you like to have?  
17 Just so that we kind of have the batting order set up, about  
18 how long would you like to file the amended complaint?

19 MS. COOPER: Would 30 days be acceptable?

20 THE COURT: Umm-hmm. We normally do 28 or 38.  
21 Let's call it 30.

22 And then the ordinary briefing schedule would  
23 apply, so 28, 28, and 14 to the motion to dismiss, unless  
24 anybody would like to move for something different than  
25 that.

1 MS. COOPER: Okay.

2 THE COURT: Is that acceptable to the plaintiff's  
3 side?

4 MS. COOPER: Yes, it is, Your Honor.

5 THE COURT: How about the defense side?  
6 Twenty-eight, and then plaintiff will have 28, and then  
7 you'll have 14?

8 MR. KAISER: It would be acceptable to me, Your  
9 Honor. I was just doing the math in my head. That will put  
10 our responses due through the holiday season. So I would  
11 say that that timeline is fine now, but we might request an  
12 extension if the holidays....

13 THE COURT: Sure. And I know that counsel for  
14 both sides, you'll work together on those issues, especially  
15 on something like this and so early in the case. If you  
16 agree to some other schedule, there won't be an issue. But  
17 do let us know so that we can adjust our order. Okay.

18 MS. COOPER: Thank you, Your Honor.

19 THE COURT: You're most welcome.  
20 Counsel?

21 MR. KAISER: May I ask one further clarification  
22 question?

23 THE COURT: You may.

24 MR. KAISER: In the Court's clarification, you  
25 said that Mr. Styler and Ms. McConkie were still -- or

1 Ms. McConkie was still in on Count 3. Count 3 is the breach  
2 of trust claim that is brought under state law, and a  
3 conspiracy to violate law, state and federal. And as I read  
4 the Court's order on page 38, it says, "The Tribe's  
5 non-breach of contract state law claims are dismissed." So  
6 I understood that to apply not only to the subsequent claims  
7 of equitable estoppel and whatever those were sort of at the  
8 end, but also to the breach of trust claims because of the  
9 conspiracy to violate law that appeared to be addressed by  
10 the Court's order on Count 1. And so the only thing that  
11 would have been left was breach of trust under state law.

12 Was it the Court's intent to dismiss that breach  
13 of trust claim? And it might not matter, because we're  
14 going to get an amended complaint. But to the extent that  
15 the arguments that we made about the state law claims would  
16 apply to the breach of trust claim under state law, that  
17 might affect what the plaintiff decide to do on their  
18 amendment, and it might affect our arguments in the future.  
19 So clarification would be helpful.

20 THE COURT: Okay. So I feel like all of this is  
21 really sort of mooted by the fact that we're going to have  
22 an amended complaint. I appreciate you raising it, but I  
23 don't know that there's any need to parse it. And I don't  
24 recollect, as I sit here now about, in terms of how it was  
25 argued by both sides in your briefs, whether it was clear

1 that all that was left for breach of trust was a state law  
2 avenue or not.

3 And again, I guess we have a smaller species in  
4 Count 3 of the issue that I raised for Count 1, which is we  
5 have a breach of trust allegation and then a conspiracy to  
6 violate law. The breach of trust appears to be stated under  
7 state law, the conspiracy to violate law under state and  
8 federal law.

9 So I wonder if in this next go-around we'll have  
10 an opportunity for a pleading that just contains one cause  
11 of action under each count, and it will probably help all of  
12 us, including the Court, to be more precise in that next  
13 round. So why don't we leave it there, Counsel.

14 MR. KAISER: Thank you. I appreciate it, Your  
15 Honor.

16 THE COURT: All right. Counsel, first for the  
17 plaintiff and then for the defendants, is there anything  
18 else that we should take up in this hearing today?

19 MS. COOPER: Your Honor, on behalf of the  
20 plaintiff, we have nothing else. And we thank the Court for  
21 its time.

22 THE COURT: Most welcome. Thank you, Counsel.

23 Anything from counsel for the defendants that you  
24 wish to take up?

25 MS. WALSH: No, thank you.



1 MR. KAISER: No, thank you, Your Honor.

2 THE COURT: All right, then. Very well. Counsel,  
3 thank you for your efforts in this matter. We'll be in  
4 recess. And if you need a scheduling order that is  
5 different than the 28, 28, and 14, you'll let me know that  
6 you've agreed, or that you, unfortunately, despite your best  
7 efforts, cannot agree, and then we'll help you resolve it.  
8 Thank you, Counsel, we're in recess.

9 (The matter concluded at 1:53 p.m.)

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COURT REPORTER'S CERTIFICATE

State of Utah                    )  
  ss.  
County of Salt Lake    )

I, Michelle Mallonee, a Registered Professional  
Reporter in and for the State of Utah, do hereby certify:

That the proceedings of said matter was  
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That the same constitutes a true and correct  
transcription of said proceedings so taken and transcribed;

I further certify that I am not of kin or  
otherwise associated with any of the parties of said cause  
of action, and that I am not interested in the event  
thereof.

WITNESS MY HAND at Salt Lake City, Utah, this  
3rd day of December 2024.



Michelle Mallonee, RPR, CCR  
Utah CCR #267114-7801  
Expires May 31, 2026